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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 110

WILLIAM MALLOY,

*Petitioner,*

*—versus—*

PATRICK J. HOGAN,
Sheriff of Hartford County,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

## BRIEF FOR PETITIONER

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## BRIEF FOR PETITIONER

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### STATEMENT OF THE CASE

On September 11, 1959, as the result of a general raid that was conducted in the Hartford area of the State of Connecticut by the police departments of the State of Connecticut and the City of Hartford, the Petitioner, along with others, was arrested in an apartment at 600 Asylum Avenue, Hartford. (R 6, 9, 16, 27)

He was found guilty of poolselling, fined five hundred dollars, and he was given a one-year sentence in the County jail. The sentence was ordered to be suspended after 90 days, at which time he was to be placed on probation for two years. (R 6, 17, 27).

Thereafter, on January 16 and 25, 1961, the Petitioner was subpoenaed to appear before the Honorable Enest A. Inglis, who was conducting an investigation to determine whether there was probable cause to believe that crimes, including gambling, were committed in Hartford County. (R 7, 17, 27).

On both days, the Petitioner answered several questions, but he refused to answer the following questions that were posed by the State's Attorney: (1) For whom did he work on September 11, 1959; (2) Who selected and paid his counsel in connection with his arrest on September 11, 1959, and his subsequent appearances in court due to said arrest; (3) Who selected and paid his bondsman; (4) Who paid his fine; (5) The name of the tenant of the apartment in which he was apprehended; and (6) Did he know one John Bergoti. (R 7, 8, 9, 10, 17, 18, 19, 20, 27, 28).

His refusal to answer the aforesaid propounded questions was due to an unwillingness to be a witness against himself, believing that any answer by him would be incriminating and that he was protected in his refusal by the Fifth Amendment to the Constitution. (R 7, 8, 9, 10, 17, 18, 19, 20, 28).

In time, he was held to be in contempt. (R 10, 28). He appealed to the Supreme Court of Errors of the State of Connecticut from the judgment of the lower court, dismissing an application for a writ of habeas corpus to release him from jail, to which he had been committed because of his refusal to answer the aforesaid questions. (R 14, 28).

The lower court held that the Fifth Amendment was not applicable on the ground that it was restricted to federal proceedings only. (R 10, 21). It also held

that the Petitioner's assertion that any answer by him would tend to incriminate was inadequate, as it was for the court to determine, from the circumstances of the case and the nature of the evidence sought from the Petitioner, whether there was reasonable basis to apprehend danger of criminal liability by any compulsory answer. (R 11, 21). It concluded that the questions asked of the Petitioner evinced no real, appreciable danger to him and that, therefore, the writ of habeas corpus should be dismissed. (R 12, 21).

The Supreme Court of Errors of the State of Connecticut upheld the findings and rationale of the lower court, including, among others: (a) that the assertion that the answering of the questions would be incriminating is not enough, but that a court, before granting the privilege of not answering, must reasonably conclude, from the circumstances of a particular case, that criminal liability will result, ignoring the crucial factor that any explanation for the refusal to testify would result in the giving of the incriminating evidence that was being sought by the interrogation, and (b) that the Fifth Amendment does not apply to state proceedings. (R 35).

## SUMMARY OF ARGUMENT

By virtue of the case of *Mapp v. Ohio*, 357 U.S. 643, this Court held for the first time that the provisions of the Fourth Amendment against unreasonable searches and seizures is enforceable against the States through the Due Process Clause of the Fourteenth Amendment.

Inasmuch as the Fifth Amendment is indissolubly entwined with the Fourth Amendment as complementary and equal entities in the Bill of Rights, (*Boyd v.*

*U.S.*, 116 U.S. 616, 630-635; *Bram v. U.S.* 168 U.S. 532, 543-545; *Brown v. Walker*, 161 U.S. 591, 596, 606), it logically follows that the provision of the Fifth Amendment protecting any person in a criminal case from testifying against himself should be extended likewise by the Fourteenth Amendment to cover State proceedings, as it does Federal proceedings.

If it is held that the Fifth Amendment, as supplemented by the Fourteenth Amendment, is applicable to State proceedings, it follows then that the propriety of the questions directed to the Petitioner, to which he objected on the ground of incrimination, should be determined by the constitutional standards implicit in the Fourteenth Amendment, rather than by the standards pursued by the State of Connecticut. *Rogers v. Richmond*, 365 U.S. 534, 543-545; *Mapp v. Ohio*, supra; *Ker v. California*, 10 L. ed 2nd 726, 735, 736.

The finding of the Supreme Court of Errors of the State of Connecticut that the questions asked of the Petitioner as set forth in the Statement of the Case, supra, were harmless as the answers thereto would not incriminate, flowed from its standard that all questions must be answered unless it can be *reasonably* concluded, from the circumstances of the particular case, that criminal liability will result. (emphasis added). By adherence to this standard, it violated the milder less-demanding federal standards, holding that the privilege against testifying should be sustained on the *mere possibility* of the disclosure being incriminating or dangerous to the witness. (emphasis added). 1 *Burr's Trial*, 244; *Hoffman v. U.S.*, 341 U.S. 479, 490; *U.S. v. Doto*, 205 F. 2nd 416; *U.S. v. Coffey*, 198 F. 2nd 438, 440, 441; *Maffie v. U.S.*, 209 F. 2nd 225.

## ARGUMENT

### I

### The Fifth Amendment, As Supplemented By The Fourteenth Amendment, Applies To State Proceedings.

In the determination of whether or not the Fifth Amendment, supplemented by the Fourteenth Amendment, applies to State proceedings, a brief statement of the judicial history of the Bill of Rights, with special stress upon the Fourth Amendment, is relevant and in order.

Starting with the case of *Barron v. Baltimore*, 7 Peters 243, 8 L. ed. 672, it was held that none of the first eight Amendments in the Bill of Rights was applicable to the States, resulting in the dismaying development of two separate and conflicting standards of constitutional adjudication.

This judicial concept continued beyond the adoption of the Fourteenth Amendment in 1868 and the case of *Twining v. New Jersey*, decided in 1908, 211 U.S. 77, and until the 1920's, when a shift from this position, which has been growing stronger steadily, took place.

As a result of this shift, this Court has ruled: (a) that the First Amendment must be observed by the States (*Gitlow v. New York*, 268 U.S. 652, 666; *Cantwell v. Connecticut*, 310 U.S. 296, 303; *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 633; *DeJonge v. Oregon*, 299 U.S. 353, 364;

*Bridges v. California*, 314 U.S. 252, 277; *Palko v. Connecticut*, 302 U.S. 327); (b) that the requirement of the Fifth Amendment that just compensation shall be paid for private property taken for public use must be observed by the States (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 240-241); (c) that the requirement of the Sixth Amendment that an accused shall have the assistance of counsel for his defense must be observed by the States (*Powell v. Alabama*, 287 U.S. 45, 68-69; *Carnley v. Cochran*, 369 U.S. 506); and (d) that the requirement of the Fourth Amendment against unreasonable searches and seizures must be observed by the States. (*Mapp v. Ohio*, supra; *Ker v. California*, supra).

These decisions, which, of course, are reconsiderations of former decisions of this Court, are the product of: (a) a keener awareness and appreciation of the history that prompted the introduction and passage of the Bill of Rights; (b) a more mature comprehension of the breadth and extension of the first eight amendments of the Bill of Rights; (c) a broader understanding of the full import of the Fourteenth Amendment and the basic, personal rights protected by its "privileges or immunity" and its "due process of law" clauses; and (d) a continuing construction of the Constitution, consistent with its fundamental guarantees, to enable it to adjust to the "needs both of continuity and of change, in a progressive society."

Although this Court held, until relatively recent years, that the first eight amendments were not effective against the States, it now holds, as noted earlier, that at least some of these amendments must be observed by them. Whether this change came about through a theory of the incorporation of the Bill of

Rights by the Fourteenth Amendment, or the application of the privileges or immunities clauses of the Fourteenth Amendment, or the application of the Due Process Clause of the Fourteenth Amendment, or by the process of absorption through the Fourteenth Amendment that is grounded on the belief that neither liberty nor justice would exist, if these constitutional guarantees were denied in any forum, isn't too important. What is of moment is the current cognizance that these guarantees are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "of the essence of the scheme of ordered liberty" that the judgment of the State Court in this case, that the Petitioner must incriminate himself, is so opposed to these ideas as to warrant a reversal.

It is submitted that the *Mapp* and the *Ker* cases, which forthrightly declared that the Fourth Amendment is enforceable against the States by the same sanction of exclusion as is used against the Federal government, are persuasive precedents for the claim that the Fifth Amendment should similarly be declared enforceable against the States, particularly in the light of *Boyd v. U.S.*, supra; *Brown v. Walker*, supra; *Bram v. U.S.* supra; and *Weeks v. U.S.*, 232 U.S. 383, each of which found that the Fourth and Fifth Amendments were so intertwined as to be complementary. On this basis, no reason exists for a refusal to give to the Fifth Amendment the same interpretation, validity and enforcement as are given to the Fourth Amendment. Certainly, to claim that too long a line of precedents exists to permit this to be done is not the answer. Were it so, the *Mapp* case would have been decided otherwise, for it, too, broke with precedents of long, long standing.

Implicit in the Fifth Amendment are values that equate with those in the First, Fourth and Sixth Amendments, all of which have been declared to be applicable to the States. It follows then that the Fifth Amendment must also be held to embody the same "fundamental principles of liberty and justice which lie at the base of . . . our civil and political institutions," as do these other amendments.

## II

**The Fourteenth Amendment Imposes Restrictions Upon The States In Criminal Matters By An Insistence Upon The Use Of Federal Constitutional Standards Of Due Process In Lieu Of Their Own Standards Or Concepts Of Due Process.**

Whenever an amendment to the Constitution of the United States is declared to be effective against the States, there is an incidental, correlative finding that a State Court, in its decision, must be governed by the federal constitutional standards and the decisions of this Court in applying and construing the amendment.

The following citations, which are believed to be adequate to illustrate the point, establish this to be correct:

(a) *Ker v. California*, Pgs. 735-736, 738. (supra).

"In Mapp v. Ohio, 367 U.S. at 646, 647, 657, we followed Boyd v. United States, 116 U.S. at 616, 630, which held that the Fourth Amendment, implemented by the self inerimination clause of the Fifth, forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the Fourth Amendment. We specifically held in Mapp that this constitutional

prohibition is enforceable against the States through the Fourteenth Amendment. This means, as we said in Mapp, that the Fourth Amendment "is enforceable against them (the states) by the same sanction of exclusion as is used against the Federal Government," by the application of the same constitutional standard prohibiting "unreasonable searches and seizures." . . . We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here . . . While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental - i.e., constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

(b) *Mapp v. Ohio*, Pgs. 654-656, 685. (supra)

"We hold that all evidence obtained by searches

and seizures in violation of the Constiution is, by that same authority, inadmissible in a state court . . . Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Proces Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without the rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." . . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal —it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure . . . Federal-State cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."

(c) *Rogers v. Richmond*, 365 U.S. 534, 540.

"A critical analysis of the Connecticut proceedings leads to disposition of the case on a more

immediate issue. For it compels the conclusion that the trial judge in admitting the confessions as "voluntary," and the Supreme Court of Errors in affirming the conviction into which the confessions entered, failed to apply the standard demanded by the Due Process Clause of the Fourteenth Amendment for determining the admissibility of a confession.

Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accustorial and not an inquisitorial system, a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

## III

### The State Standards That Were Applied In This Case Were More Rigorous Than, And Not In Conformity With, The Federal Standards of Due Process.

The State court had adjudged that the Petitioner was clothed with the privilege against self-incrimination, at least by its constitution, (R 28-29), but that, nevertheless, the questions asked of him (R 7-10, 17-20, 28) had to be answered as, to do so, would not violate state precedents on this subject, nor the provisions of the Fifth Amendment, nor due process under the Fourteenth Amendment. (R 35). It used the following standards as its guide lines in determining that the Petitioner would not incriminate himself:

a) Whether a question does or does not tend to incriminate cannot be left *solely* to the witness' judgement, since he could then refuse to answer obviously innocuous questions. (R 29).

b) A mere claim that the evidence will incriminate is not sufficient. (R 29-30).

c) After a witness claims the privilege, it becomes necessary for the Judge to determine in the exercise of a legal discretion whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is *reasonable* ground to apprehend danger of criminal liability from compulsion to answer. (R 30).

d) The danger to the witness must be *real and appreciable*, with reference to the ordinary operations of law in the ordinary course of things. (R 30).

e) A *merely remote and naked possibility*, out of the ordinary course of law and such as no *reasonable* man would be affected by, should not be suffered to obstruct the admission of justice. (R 30).

Assuming for the moment that there is accord that the Fifth and Fourteenth Amendments apply in this case, it is urged that the State standards are too high and too drastic to conform to the far less rigorous requirements of the Due Process Clause as set forth in the leading case of *Hoffman v. U.S.*, 341 U.S. 479, in which were established the following principles in determining the self-incriminating quality of so-called innocuous questions:

a) The "link in the chain" of evidence rule, as first announced in *Blau v. U.S.*, 340 U.S. 159, was reiterated and followed.

b) The witness' own declaration that the question is incriminating is insufficient to invoke the privilege.

c) The witness should not be compelled to prove the incrimination so as to destroy his protection.

d) The Court, in deciding the applicability of the privilege, should consider external circumstances.

e) The privilege should be sustained on the *mere possibility* of the disclosure being dangerous.

Other cases, following the spirit of the *Hoffman* case, are *U.S. v. Doto*, 205 F. 2nd 416; *U.S. v. Coffey*, 198 F. 2nd 438, holding that "in a determination whether a witness really apprehends danger in answering the question, the Judge cannot permit himself to be skeptical, rather must he be acutely aware that, in the deviousness of crime and its detection, incrimination may be approached by obscure and unlikely lines of inquiry"; *Isaacs v. U.S.*, 256 F. 2nd 658, holding that "to warrant a denial of the privilege, it must appear in the setting in which the question is asked that the answer *cannot possibly have a tendency to incriminate*"; and *Maffie v. U.S.*, 209 F. 2nd 225.

Even a cursory comparison of the two sets of standards reveals a substantial and critical difference between them — to the degree that the State's standards, especially at this junction in world events when the importance of the concept of a free people in a democratic society, with their unique personal rights and privileges, was never greater, is shocking to the conscience and justifies the intervention of this Court on constitutional grounds.

As to the contention of the State court that the Petitioner, whose conviction more than a year earlier

was for a misdemeanor, could not be prosecuted because of his answers as an existing one year statute of limitations in matters of misdemeanors would protect him (R 33), it can be said safely that this is a most unsophisticated approach. To conclude that a person, involved with many others in a field of criminal activity, necessarily limited himself to the commission of misdemeanors and had not, under any circumstances committed or shared in a felony, is too naive to be given any standing. And the statute of limitations for felonies is five years.

While the Record does not show definitely the size of the catch that was brought in by the 1959 police raid, one can reasonably assume from what there is therein that the haul was significant. In any event, the Record does disclose that at least two other persons were arrested with the Petitioner in that episode. (R 24-27). From this fact and the fact that he was engaged in criminal activity, it would seem *reasonable*, even by the standards of the State court, that the persons sought to be identified by the Petitioner could give testimony that might well involve him in a prosecution. Otherwise, there would be no sense to the questions posed to the Petitioner. And, at the very least, it is not amiss to assume that an experienced State's Attorney did not ask frivolous or harmless questions on this occasion.

## CONCLUSION

The *Mapp* case cleansed a smudge from the escutcheon of Justice when it prohibited the States from the obnoxious practice of unreasonable searches and seizures, and made one's home again the sanctuary that it was guaranteed to be by the constitution.

Another smudge can be removed by a reversal of the decision of the State court in this case, which is as momentous as, and conceptually linked with, the *Mapp* case. The right to become untrammeled in this area of constitutional guarantees is of no less standing and validity than in *Mapp*.

Respectfully submitted,

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